No. 91-726

In the Supreme Court of the United States

OCTOBER TERM, 1991

THELMA WEASENFORTH LUNAAS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the statute of limitations, 28 U.S.C. 2501, bars an action against the government to recover the principal and interest on a loan made during the Revolutionary War.

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OPINIONS BELOW

The decision of the court of appeals, Pet. App. A2-A9, is reported at 936 F.2d 1277. The decision of the United States Claims Court, Pet. App. A10-A19, is unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. A1, was entered on June 25, 1991. A petition for rehearing was denied on July 31, 1991. Pet. App. A20-A21. The petition for a writ of certiorari was filed on October 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

According to the allegations in her complaint, petitioner is a descendant of one Jacob De Haven. In 1777-1778, De Haven lent the revolutionary government $450,000 in specie and supplies to support General Washington's army at Valley Forge. Pursuant to a contract authorized by the Continental Congress, the loan provided for six percent interest to be paid annually over the three-year term of the loan, and the United States pledged its full faith and credit for payment of the principal and interest. Despite numerous demands of De Haven, his heirs, and their descendants, petitioner alleges that no part of the loan or interest has been paid. Pet. App. A4.

In 1989, petitioner filed this action in the United States Claims Court to recover her share of the proceeds due. Pet. App. A4. Relying on the applicable six-year statute of limitations, 28 U.S.C. 2501, the Claims Court granted the government's motion to dismiss for lack of jurisdiction because petitioner's claim had accrued more than six years before she filed this action. *Id.* at A15.

The court of appeals affirmed. Pet. App. A3-A9. The court noted that De Haven demanded repayment prior to his death in 1812, and that his descendants made demands for repayment periodically between the 1850s and early 1900s. *Id.* at A7. Hence, in the court's view, even if a demand for repayment were essential to the accrual of a claim, the claim in this case accrued no later than 1863, when Congress first provided a judicial remedy for contract claims against the United States. *Id.* at A8. The court rejected petitioner's contention that Article VI of the Constitution, which transferred the debts of the Confederation to the new government, precludes the imposition of a limitations period on debts incurred by the gov-

ernment prior to the adoption of the Constitution. *Id.* at A8-A9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals; further review is unwarranted.

1. This case turns on a straightforward application of 28 U.S.C. 2501, which provides:

> Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereof is filed within six years after such claim first accrues.

It is well settled that, for purposes of Section 2501, a claim "accrues" when all of the events fixing liability have occurred. See, *e.g.*, *L.S.S. Leasing Corp.* v. *United States*, 695 F.2d 1359, 1365 (Fed. Cir. 1982). In this case, the loan, made in 1777-1778, had a three-year term. Pet. App. A4. Petitioner concedes that a holder of preconstitutional government debt knew or should have known that a claim against the government existed after such debt was reaffirmed in Article VI of the Constitution. Pet. App. A7; Pet. 20. Indeed, De Haven presented his note for payment several times before his death in 1812. Pet. App. A7; C.A. App. 6, 8, 13.[1] And his descendants have made numerous demands for repayment, including the filing of petitions for relief with Congress in the 1850s, 1870s, 1890s, and early 1900s. Pet. App. A4, A7; C.A. App. 10. The court of appeals properly con-

[1] Because De Haven in fact demanded repayment, petitioner's contention, Pet. 6, 9, that De Haven had the option to postpone the deadline for repayment and accrue interest indefinitely is beside the point.

cluded, Pet. App. A6, that even if petitioner's claim were of the kind that accrues only when a demand for payment is made, see, *e.g.*, *Lins* v. *United States*, 688 F.2d 784, 787 (Ct. Cl. 1982) (citing cases), cert. denied, 459 U.S. 1147 (1983), it would be time-barred under Section 2501.[2]

In fact, the claim petitioner asserts here has been time-barred for 123 years. Although the First Congress established a plan for the administrative settlement of preconstitutional government debt, Act of Aug. 4, 1790, ch. 34, 1 Stat. 138,[3] the earliest opportunity for judicial redress arose in 1863. That year, Congress authorized the Court of Claims (the predecessor to the Claims Court) to render final judgments on contract claims against the United States. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765. Although Congress provided that such claims were to be "forever barred" unless filed within six years of when they "first accrue[d]," a savings clause provided that claims accruing more than six years prior to the passage of the Act would not be barred if filed within three years. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767. De Haven's descendants therefore had until 1866 to file suit for recovery of the loan and any interest due.

2. Petitioner contends, Pet. 11-23, that application of the statute of limitations to bar her claim violates Article VI of the Constitution. Article VI, Clause 1, provides that "[a]ll Debts contracted * * *

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[2] As a limitation or condition upon the sovereign's consent to be sued, Section 2501 "must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

[3] By subsequent enactments, Congress extended the plan until it finally expired in 1837. Pet. App. A6.

before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." Based on that clause, petitioner recasts her claim for repayment of a debt as a constitutional claim that is invulnerable to any statute of limitations.[4] As this Court has made clear, however, "[a] constitutional claim can become time-barred just as any other claim." *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983).

Petitioner cites no authority suggesting that Article VI was intended to prohibit the United States from adopting an orderly mechanism for the disposition of the claims for debt assumed from the Confederation under Article VI. As petitioner's two-century-old contract claim well illustrates, a reasonable statute of repose is crucial to any rational processing of those claims:

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seri-

[4] Petitioner suggests, Pet. 20, that the Article VI claim accrued in 1887, when Congress authorized the Court of Claims to adjudicate claims arising under the Constitution. Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505. As petitioner acknowledges, Pet. 21, even under her view the statute of limitations would have expired in 1893 under the six-year limitations period.

> ously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. *Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted). Particularly in view of the elementary constitutional principle that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued," *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941), it can hardly be assumed that the Framers silently forfeited the authority of the United States to adopt a reasonable limitations period for the claims transferred by Article VI.

3. Petitioner next contends that, even if Section 2501 bars her claim for interest that accrued more than six years before she filed this action in 1989, her claim for the principal and any interest accruing after 1983 survives under the continuing claim doctrine. Pet. 23-25. That contention is without merit. The continuing claim doctrine provides that when payments come due periodically by law or contractual right, "each successive failure to make proper payment gives rise to a new claim upon which suit can be brought." *Friedman* v. *United States*, 310 F.2d 381, 385 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963). As discussed, any claim to the principal amount of the loan became time-barred as of 1863.[5] Petitioner indicates no contractual or statutory basis for concluding that her claim to interest survived independently of the principal amount upon which

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[5] Petitioner suggests that she may invoke the continuing claim doctrine with respect to the principal because nonpayment effects a continuing constitutional violation. Pet. 25. That suggestion, however, merely rehearses her constitutional claim in the rubric of the continuing claim doctrine. As discussed, the constitutional claim is without merit.

that interest was due.[6] That omission is fatal to petitioner's claim because Congress is understood to have waived federal sovereign immunity against awards of interest "only where *expressly* agreed to under contract or statute." *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 (1986) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Hence, this case is distinct from those in which this Court has addressed the accrual of a cause of action on interest coupons appended to a bond. See, *e.g.*, *Amy* v. *Dubuque*, 98 U.S. 470 (1878); *Clark* v. *Iowa City*, 87 U.S. 583 (1874). In those decisions, the Court concluded that the coupons were themselves "separate written contracts, capable of supporting actions after their maturity, without reference to the maturity or ownership of the bonds." *Amy*, 98 U.S. at 475; see *Clark*, 87 U.S. at 589. In contrast, the interest here was "simply an incident of the debt." *Amy*, 98 U.S. at 472.

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Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Does Article VI(1)[1] of the Constitution of the United States give rise to a right of action to recover Revolutionary War loans?

2. Is the statute of limitations applicable to the United States Claims Court (28 U.S.C. 2501) unconstitutional as applied to claims founded upon Article VI(1) of the Constitution of the United States, having regard to the fact that, if such statute applies, enforcement of *no* such claim could have been demanded after (at the latest) March 3, 1893?

3. May Congress, by means of a statute of limitations, foreclose, forever and as to *all* possible claimants, payment of obligations imposed by Article VI(1) of the Constitution of the United States, which, by preserving and giving effect to Article XII of the Articles of Confederation, continues to solemnly pledge and mandate payment of such obligations without limitation of time?

4. May the non-constitutional doctrine of sovereign immunity be used to defeat a constitutional provision?

5. Has the unfulfilled constitutional provision of Article VI(1) of the Constitution of the United States become time-barred?

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[1] For brevity, Petitioner will refer to U.S. CONST. art. VI, cl. 1, as "Article VI(1)". Like designations are used for the other two clauses of that Article.

QUESTIONS PRESENTED – Continued

6. Does the statute of limitations applicable to the United States Claims Court (28 U.S.C. 2501) bar the recovery of interest accruing on a loan during the six years immediately preceding the filing of Petitioner's complaint?

7. Does the statute of limitations applicable to the United States Claims Court (28 U.S.C. 2501) bar the recovery of a loan, the terms of which were modified, by proper Congressional enactment, to postpone the time for repayment and permit interest to accrue indefinitely?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF

OPINIONS BELOW

The unreported decision of the United States Claims Court is set forth in Petitioner's Appendix. Pet. App. A10. The Court's reasons for that decision, announced orally and reflected in a transcript of the proceeding, are set forth in Petitioner's Appendix. Pet. App. A11-A19.

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 936 F.2d 1277 (Fed.Cir.

1991) and is set forth in Petitioner's Appendix. Pet. App. A2-A9.

BASIS OF THE COURT'S JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its decision in this case on June 25, 1991. Pet. App. A1. That Court denied a timely petition for rehearing with suggestion for rehearing *en banc* on July 31, 1991. Pet. App. A20-A21.

The petition for a writ of certiorari was filed on October 29, 1991. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The statement of the case is as set forth in Petitioner's petition for a writ of certiorari. Pet. 5-9.

ARGUMENT

The government, in its Brief for the United States in Opposition, attempted to reach its desired result by: (1) ignoring critical facts of the case, (2) over-simplifying the issues, (3) wholly failing to address any of the constitutional issues of first impression raised by Petitioner, (4) citing case law having little, if any, relevance to the facts of this case, and (5) ignoring the mandates of landmark decisions of this Court. For the reasons which follow, the

government's brief fails to address the true issues before this Court.

I. This Case Raises Constitutional Issues of First Impression

Because this is a case of first impression, it obviously is not in direct conflict with any decision of this Court or any other court of appeals. However, if the decision of the Court of Appeals is permitted to stand, an exception will have been created to the fundamental rule established by *Marbury v. Madison*, 5 U.S. 137 (1803). Hereafter, the Constitution of the United States will not be the supreme law of the land if Congress feels it has a good reason for departing from it. Article VI(1) itself will cease to have effect. The potential ramifications of such an exception and result are unacceptable. For that reason, further review *is* warranted.

The government contends that this is just another case in which a constitutionally-based claim can be time-barred. The government entirely overlooks the fact that Article VI(1) of the Constitution is fundamentally different from any other provision inasmuch as it imposes on the United States a positive obligation that is not limited by time. This matter has been addressed in the petition for writ of certiorari. Pet. 12-19. Furthermore, because Article VI(1) has never before been judicially interpreted, not only does the present case not conflict with prior decisions of this Court, but it also presents a case of first impression regarding the true interpretation of that Article, and, in fact, of its shelf life.

The government contends that this case turns on a straightforward application of 28 U.S.C. 2501. U.S. 3. As demonstrated by Petitioner's statement of questions presented, the real issues are far more complex.

There are no cases in which the true construction of Article VI(1) of the Constitution has been considered. If the government is correct in contending that Petitioner's claim has been time-barred for 123 years and that the Court must follow authority such as *Block v. North Dakota*, 461 U.S. 273 (1983), then the result is that *no* Article VI(1) claim can be enforced. No statute or case law has ever effected such a result. Article V to the Constitution precludes such a result. The question here, which has never before been answered, is whether the Constitution of the United States will permit such a result to ensue.

Also due to the unique characteristics of Article VI(1), other general propositions are inapplicable. *See, e.g., Soriano v. United States*, 352 U.S. 270, 276 (1957) (Section 2501 "must be strictly observed and exceptions thereto are not to be implied"); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued"). Article VI(1) expressly states that these debts "shall be valid *against* the United States". This Court, as ultimate arbiter of the Constitution, must ensure that the Constitution is upheld in those instances where, as here, Congress refuses to act and attempts to prohibit any other body from acting.

Contrary to the contention of the government (U.S. 5), Petitioner did cite authority suggesting that Article

VI(1) was intended to prohibit the *Congress* from "adopting an orderly mechanism for the disposition of the claims for debt assumed from the Confederation under Article VI(1)." *See,* Pet. A12-A15. Evidence of our Framers' intent, which can be gleaned from the debates surrounding the adoption of Article VI(1) and the further debates and reports of our first Congress, will be fully briefed upon this Court's decision to hear the case.

Petitioner does not contend that the Framers silently forfeited the authority of the *United States* to adopt a reasonable limitations period for the claims transferred by Article VI(1). U.S. 6. Through the amendatory process authorized by Article V of the Constitution, the people of this country can put an end to the solemn pledge of Article VI(1). But they have not done so. And the Congress cannot do so by statute.

II. Omitted Facts Affect the Entire Posture of the Case

Petitioner alleged that Jacob De Haven, her ancestor and a lender of funds to the government during the Revolutionary War, was given the option to continue his money *indefinitely* at interest. Pet. 6. Contrary to the government's contention, Petitioner even cited authority for that allegation. Pet. App. A42[2]. Petitioner never asserted

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[2] Alexander Hamilton was, at the material times, Secretary of the Treasury of the United States, the Respondent herein. Accordingly, his statements relevant to this case have evidentiary value as admissions by a party opponent. *See, Federal Rules of Evidence,* Rule 801(d)(2)(C) and (D).

that recovery of the principal might be time-barred under the continuing claims doctrine and, consequently, this case is more akin to *Amy v. Dubuque*, 98 U.S. 470 (1878) and *Clark v. Iowa City*, 87 U.S. 583 (1874). This issue will likewise be fully briefed upon this Court's decision to hear the case.

In its brief, the government initially neglected to mention the continued accrual of interest (U.S. 2) and then subsequently tried again to use general principles plus an erroneous set of facts to conclude that continued accrual of interest was not possible and that Petitioner's claim must thus fail. U.S. 6-7. The government further failed to cite any authority demonstrating that the right to the principal and/or indefinite accrual of interest had been terminated.

Because the case was disposed of on a motion to dismiss for lack of jurisdiction and, consequently, all facts must be viewed in the light most favorable to the Petitioner, this Court must assume to be true Petitioner's allegation that Jacob De Haven's loan continues to accrue interest. This is particularly so inasmuch as the government has offered no evidence to the contrary and precluded Petitioner from discovery on such issues by successfully filing a motion to suspend discovery.

The mere fact that Jacob De Haven and his heirs made various demands for repayment, without evidence regarding the government's response to said demands, cannot affect that result. For all we know, the government told Mr. De Haven and his descendants, "sorry, we cannot pay now – come back later". The government may have said something to the effect of "we will check into

the matter". Accordingly, without development of the facts, the government's "accrual of the claim" arguments are irrelevant, at the very least, to the issues now before this court.

Even assuming 28 U.S.C. 2501 can be constitutionally applied to Petitioner's claim, Petitioner is in no way barred from seeking judicial redress for recovery of the principal and the interest which accrued during the six years preceding the filing of this action.

III. The Purposes of Statutes of Limitations are Not Satisfied by the Straightforward Application of 28 U.S.C. 2501 and Its Predecessors to Article VI(1) Claims

Although the government contends that the earliest opportunity for judicial redress of this claim arose in 1863, Petitioner's ancestors actually had a limited remedy in 1855 when the United States Court of Claims was first established. However, even by 1855, witnesses were already dead and faded memories were thus irrelevant, and documents were already destroyed due to repeated burnings of the Treasury department and other governmental buildings.

Strangely enough, a proper examination into the merits of Petitioner's claim can be more easily undertaken now than at any other time since 1855. Prior to the establishment of the National Archives, government documents were warehoused in a multitude of various buildings and unavailable for public inspection. Now, many documents relevant to Petitioner's claim are orderly

housed and available in the National Archives. And presumably, the government continues to find ways to improve the dissemination of the information contained in them.

Pursuit of Petitioner's claim can be more easily undertaken now than at any other time since 1855. Prior to the adoption of the Federal Rules of Civil Procedure, full discovery of all relevant government documents was difficult, if not impossible. By the time even limited judicial redress was accorded Petitioner's ancestors in 1855, the numerous family members resided in various places across the continent and summoning them all together for the purpose of pursuing this claim would have been an arduous task. The advent of the class action provisions of the Federal Rules and improvement in communication facilities rendered suit more feasible.

The only purpose advanced by application of 28 U.S.C. 2501 and its predecessors to Article VI(1) claims is that no Article VI(1) claim can ever be enforced. Again, can this be done?

CONCLUSION

The government's reliance upon a simple application of 28 U.S.C. 2501 is misplaced. This case asks, *inter alia*, "Can Congress legislatively prevent all enforcement of an entire constitutional provision?" The Court of Appeals has answered that question in the affirmative and thereby opened the door to future derogations from the Constitution by the Legislature. Petitioner begs this Court to grant

the petition for writ of certiorari and reverse the damage thus done.

Respectfully submitted,

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